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Honorable Ira L. Myers
State Health Officer
Department of Public Health
State Office Building
Montgomery, Alabama 36130

State Agencies - Contracts -
Indemnification Clause

State Health Department may
enter into agreement containing
indemnification/hold harmless
clause with State of Michigan
for the purchase of anthrax
vaccine only if certain
requirements are met.

Dear Dr. Myers:

Reference is made to your request for an opinion from
the Attorney General as to the following matter:

"The State Health Department has been
requested by Crown Manufacturing Company
of Talladega to assist in the procurement
of anthrax vaccine used on plant premises.
Since the company manufactures products
using imported raw wool, all persons working
in or for any reason entering the plant must
be vaccinated against anthrax under agreements
between Crown and the Health Department and
Alabama Department of Environmental Management
(air pollution).

The only source of the vaccine in the free
world is the State of Michigan. Michigan has
a new policy of only selling to governmental
agencies and of requiring an indemnification

Honorable Ira L. Myers
State Health Officer
Page Two

clause which purports to hold Michigan harmless for adverse reactions and other occurrences occasioned by the administration of the vaccine.

The Department of Public Health and the Talladega County Health Department are willing to buy the vaccine from Michigan and sell it to Crown so that Crown can remain in business while protecting the public health. It should also be pointed out that anthrax has been found in cattle in adjacent counties for the first time in many years which makes the concern greater.

My question specifically is, bearing in mind the hold harmless clause, may the Health Department enter into the aforementioned contract with the State of Michigan? A copy of the contract is enclosed."

Upon further investigation, this office has ascertained additional facts. The "raw wool" in question is goat hair imported under federal regulation. It is quarantined and checked by federal authorities at the port of entry. Clean wool is then forwarded to a purchaser in sealed metal containers. The purchaser uses all possible precautionary measures and burns all residue. During processing the wool is further sterilized. The federal requirement of vaccinating plant employees is merely a further precautionary measure.

In addition the Attorney General is of the opinion that it is necessary to keep some anthrax vaccine on hand as a precaution against any unrelated isolated cases of anthrax in Alabama.

Regarding the letting of public contracts without advertisement in cases of emergencies affecting public health or safety, Code of Alabama 1975, Section 41-16-23 states:

In case of emergency affecting public health, safety or convenience, so declared in writing by the head of the institution or state agency involved, setting forth the nature of the danger to public health, safety

Honorable Ira L. Myers
State Health Officer
Page Three

or convenience involved in delay, contracts may be let to the extent necessary to meet the emergency without public advertisement. Such action and the reasons therefor shall immediately be made public by the awarding authority.

The facts as they appear in your request clearly present an emergency situation where it is necessary to obtain the anthrax vaccine to preserve public health and safety. The workers involved must be immunized against anthrax and the public must be protected against the dangers of an outbreak of the disease. Therefore, the Health Department may without delay and without public advertising purchase the vaccine.

As to the requirement of the State of Michigan that the contract with the State Health Department contain an indemnification/hold harmless clause which purports to hold Michigan harmless for adverse reactions and other occurrences which may happen by the administration of the anthrax vaccine, serious questions arise regarding the validity of such a clause in a contract entered into by a state department or agency. As a matter of public policy, the state should not enter into indemnification/hold harmless agreements with vendors. Furthermore, Section 93 of the Constitution of Alabama, 1901 as amended prohibits the state from lending its credit to a private corporation. Almost any indemnification/hold harmless agreement between the state and a vendor would violate Section 93.

The most serious problem with such indemnification/hold harmless agreements arises in view of Section 14 of the Constitution of Alabama, 1901. This provision states that the State of Alabama shall never be a defendant in any lawsuit. By entering into the indemnification/hold harmless agreement with the State of Michigan the State of Alabama in all likelihood would as a practical effect be agreeing to become a defendant in a lawsuit if any arose out of the administering of the anthrax vaccine purchased from the State of Michigan.

Considering the above constitutional provisions and matters of public policy and considering the indemnification/hold harmless clause, the State Health Department may enter into the aforementioned contract with the State of Michigan, only under the following conditions: Crown Manufacturing Company, the purchaser, must enter into an indemnification/hold harmless agreement with the State Health Department whereby the State, its departments, agencies and officials would be held

Honorable Ira L. Myers
State Health Officer
Page Four

harmless for any adverse reactions or other occurrences happening by the administration of the anthrax vaccine. Furthermore, Crown Manufacturing Company must post a corporate surety bond, a liability policy or other agreement with the State Health Department in a sufficient amount determined and approved by the State Health Department to protect the State and its officials and for compensation for damages occurring from possible liability. If and only if these requirements are met may the State Health Department enter into a contract with the State of Michigan for the purchase of the anthrax vaccine and contract for the resale of the vaccine.

The conclusion of this opinion is limited to this emergency situation and contract only and cannot be made applicable to any other situation which may arise.

I hope that your question has been adequately answered.

If our office can be of further assistance, please do not hesitate to contact us.

Sincerely,

CHARLES A. GRADDICK
Attorney General

By:

A handwritten signature in cursive script, appearing to read "Lynda K. Oswald".

LYNDA K. OSWALD
Assistant Attorney General

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